

1 temporary tags but no license plates. The caller also provided a detailed description of the route
2 taken by the Ford Focus after it left the Walmart parking lot. The caller identified herself as
3 “Stacey” and described her own vehicle as a blue Nissan. When asked to provide her contact
4 information, the caller stated that she preferred not to give that information out. When the dispatcher
5 attempted to connect the caller with an officer, the caller hung up.

6 The information provided by the 911 caller was broadcast over the police radio. Officer
7 William Nichol heard the report and headed westbound on Tropicana Avenue. He was passed by
8 a white Ford Focus heading eastbound which was occupied by two individuals matching the
9 description sent out over the police radio. Officer Nichol turned around, activated his overhead
10 lights and siren, and initiated a “felony car stop.” The suspect vehicle pulled onto the eastbound
11 facing shoulder of Tropicana Avenue.

12 After the suspect vehicle pulled over, Officer Nichol and his partner, Officer Ramirez,
13 positioned their patrol cars in a staggered formation behind the suspect vehicle. Within moments,
14 two more patrol cars arrived on the scene. As a result of the staggered formation of the patrol cars,
15 all lanes of eastbound traffic on Tropicana Avenue were blocked. Each patrol car had its side
16 spotlight activated and pointed toward the suspect vehicle. All of the officers were out of their
17 vehicles with their guns drawn.

18 After the patrol cars and officers were in position, Officer Nichol shouted instructions to the
19 occupants of the vehicle. He instructed the driver, identified as Defendant Gardeley, to show his
20 hands and throw the keys out the window. Gardeley stepped out of the vehicle and began shouting
21 back to the officers that he was deaf. Officer Nichol told Gardeley to turn around and face away
22 from the officers. During this exchange, Officer Dudley, another officer on the scene, “racked” his
23 shotgun. Officer Dudley testified that Gardeley responded to the sound of the shotgun being
24 “racked” with a whimper and went to the ground. The passenger also exited the vehicle.

25 After Gardeley and the passenger exited the vehicle, the officers approached the suspects and
26 handcuffed them. Officer Nichol gave Gardeley the *Miranda* warnings. Gardeley, pointing to his
27 ears, informed Officer Nichol that he was deaf. Upon learning that Gardeley was deaf, Officer
28 Nichol, reading from a department issued card, informed Gardeley that he had the right to a qualified

1 sign language interpreter before making any statements or answering any questions. Officer Nichol
2 also allowed Gardeley to read the card. Gardeley indicated that he understood.

3 As Officer Nichol spoke with Gardeley, other officers, including Officer Dudley, approached
4 the suspect vehicle to ensure that there was no one else inside it. Officer Dudley testified that as he
5 approached the vehicle he looked through the window and saw a sawed-off shotgun in the backseat.
6 When asked about the shotgun, Gardeley told police that as he was leaving Walmart an individual
7 approached him, pointed the shotgun at him, and tried to steal his groceries. Gardeley claimed that
8 he pulled the gun away from the individual trying to rob him and drove off. During the course of the
9 stop, the police learned that the vehicle Gardeley was driving had been reported stolen. Police also
10 recovered materials commonly used to steal cars in a subsequent search of the vehicle.

11 By way of this motion, Gardeley argues that the stop violated his Fourth Amendment rights
12 because the 911 call was insufficient to establish reasonable suspicion to conduct a stop and,
13 therefore, all evidence obtained as a result of the stop must be suppressed.¹ The Government argues
14 that the request should be denied because Gardeley does not have standing to challenge the search
15 of the vehicle. The Government also argues that, even assuming standing, the evidence is admissible
16 under certain exceptions to the general search warrant requirement.

17 DISCUSSION

18 **1. Standing**

19 As a threshold issue, the Government argues that Gardeley does not have standing to
20 challenge the search of the vehicle because he has no lawful ownership or possessory interest in the
21 vehicle. “[T]he proponent of a motion to suppress has the burden of establishing that his own Fourth
22 Amendment rights were violated by the challenged search or seizure.” *Rakas v. United States*, 439
23 U.S. 128, 131 n. 1 (1978). “To invoke Fourth Amendment protections, a person must show that he
24 had a legitimate expectation of privacy.” *United States v. Shryock*, 342 F.3d 948, 978 (9th Cir. 2003)
25 (citation omitted). To establish a legitimate expectation of privacy a person must show (1) a
26 subjective expectation of privacy (2) that society is prepared to recognize as objectively reasonable.

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28 ¹ Gardeley also raised a *Miranda* issue in his moving papers; however, that issue was withdrawn during the evidentiary hearing.

1 *United States v. Cayment*, 404 F.3d 1196, 1199 (9th Cir. 2005).

2 A person does not possess a reasonable expectation of privacy in a vehicle in which he has
3 no lawful ownership or possessory interest. *United States v. Thomas*, 447 F.3d 1191, 1197 (9th Cir.
4 2006). To establish lawful possession, a defendant must show “joint control” or “common
5 authority” over the property searched. *Thomas*, 447 F.3d at 1198. Gardeley does not own the
6 vehicle, nor has he established that he was in lawful possession of the vehicle. Although Gardeley
7 claims he was given permission by a friend to use the vehicle, he has failed to show that the friend
8 had authority to give that permission. There is nothing in the record indicating that Gardeley’s friend
9 owned the vehicle or was in lawful possession of the vehicle prior to giving Gardeley permission to
10 use it. Indeed, the record shows that Gardeley’s friend matches the description of the person
11 suspected of stealing the vehicle from a rental agency. Thus, to the extent Gardeley is challenging
12 the search of the vehicle, he has not carried his burden to show that he has standing to do so.

13 However, it appears that Gardeley’s Fourth Amendment challenge is aimed at the stop, not
14 the search, of the vehicle. Occupants of a vehicle have standing to challenge the stop of the vehicle
15 even if they have no possessory or ownership interest in the vehicle. *United States v. Colin*, 314 F.3d
16 439, 442-43 (9th Cir. 2002) (finding that both the driver and passenger of a vehicle had Fourth
17 Amendment standing to challenge the stop of a vehicle the police suspected was stolen); *United*
18 *States v. Pulliam*, 405 F.3d 782, 787 (9th Cir. 2005) (citing *United States v. DeLuca*, 269 F.3d 1128,
19 1132 (10th Cir. 2001) for the proposition that “[a]lthough a defendant may lack the requisite
20 possessory or ownership interest in a vehicle to directly challenge a search of that vehicle, the
21 defendant may nonetheless contest the lawfulness of his own detention and seek to suppress evidence
22 found in the vehicle as the fruit of the [defendant’s] illegal detention.”); *United States v. Twilley*, 222
23 F.3d 1092 (9th Cir. 2000) (finding that the defendant could challenge the stop of the vehicle on
24 Fourth Amendment grounds even with no possessory or ownership interest in the vehicle). Thus,
25 although Gardeley does not have standing to challenge the search directly, he has standing to argue
26 that the initial stop violated the Fourth Amendment, and that the evidence seized as a result of the
27 stop is subject to suppression. *Twilley*, 222 F.3d at 1095.

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2. Traffic Stop

The Fourth Amendment protects against “unreasonable searches and seizures.” U.S. CONST. AMEND. IV. A traffic stop is a seizure within the meaning of the Fourth Amendment. *United States v. Garcia*, 205 F.3d 1182, 1186 (9th Cir. 2000) (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)); see also *Whren v. United States*, 517 U.S. 806, 809-10 (1996). Police may conduct investigative traffic stops only if the stop is supported by reasonable suspicion. *United States v. Thomas*, 211 F.3d 1186, 1189 (9th Cir. 2000). Police have reasonable suspicion when there are specific, articulable facts which, when taken together with objective and reasonable inferences, form the basis for the suspicion that a particular person is engaged in criminal conduct. *Thomas*, 211 F.3d at 1189 (9th Cir. 2000) (citing *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989)). Whether there is reasonable suspicion is determined by looking at the totality of the circumstances. *Alabama v. White*, 496 U.S. 325, 330 (1990). This case involves a traffic stop where the police acted solely on information provided by a 911 caller. A 911 call must exhibit sufficient “indicia of reliability” in order to provide the reasonable suspicion necessary to justify a traffic stop. *United States v. Terry-Crespo*, 356 F.3d 1170, 1173 (9th Cir. 2004).

Citing *Florida v. J.L.*, 529 U.S. 266 (2000), Gardeley argues that the 911 call was not sufficiently reliable because the caller did not provide detailed identifying information, refused to provide a call-back number, and refused to speak with an officer. According to Gardeley, this presented an issue of anonymity requiring the police to corroborate the information before conducting the stop. In *J.L.*, the Supreme Court assessed the reliability of an anonymous phone tip. The tip was not recorded or otherwise documented, the police knew nothing about the anonymous informant, and the tip was not received via a 911 call. *Terry-Crespo*, 356 F.3d at 1174 (citing *J.L.*, 529 U.S. at 268). The court held that the tip was insufficient to provide reasonable suspicion justifying an investigative stop because it was nothing more than a “bare report of an unaccountable informant.” *J.L.*, 529 U.S. at 268. In *Terry-Crespo*, the Ninth Circuit distinguished *J.L.* and identified several factors a court should consider when determining whether a 911 call exhibits sufficient indicia of reliability, including: (1) whether the call is truly anonymous; (2) whether the 911 call is contemporaneous with emergency events; (3) whether the 911 caller is a victim of the

1 criminal activity being reported; and (4) the timing of the 911 call in relation to the activity reported.

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3 First, although “‘a tip may be anonymous in some sense,’ it may have ‘certain other features,
4 either supporting reliability or narrowing the likely class of informants, so that the tip does provide
5 the lawful basis for some police action.’” *Terry-Crespo*, 356 F.3d at 1174 (citing *Florida v. J.L.*, 529
6 U.S. 266, 275 (2000) (Kennedy, J, concurring)). In *Terry-Crespo*, the 911 caller identified himself
7 with his first and last name but did not provide a phone number or any other identifying information.
8 Even with this limited information, and despite being unable to locate the caller afterward, the court
9 found that the call sufficiently narrowed the class of likely informants. 356 F.3d at 1174. The court
10 declined to impose a duty on the police to confirm the identity of every 911 caller. *Terry-Crespo*,
11 356 F.3d at 1175.

12 Recently, in *United States v. Chacon*, 2009 WL 1520007 (D. Nev.), the court was faced with
13 similar circumstances. In *Chacon*, an individual called 911 to report that “he had just seen ‘a guy
14 put a woman in the trunk of a Cadillac.’” *Chacon*, 2009 WL 1520007 *7. The 911 caller also gave
15 a detailed description of the route being traveled by the Cadillac. The 911 caller provided his first
16 name, his telephone number, and a description of the vehicle he was driving. The court determined
17 that this was sufficient to alleviate any concerns about anonymity.

18 Here, the caller provided her first name, a description of her own vehicle, but declined to
19 provide her telephone number. The failure to provide a telephone number does “not diminish the
20 risk of losing any anonymity.” *Terry-Crespo*, 356 F.3d at 1176. Merely calling 911 and having a
21 recorded telephone conversation risks the possibility that the police could trace the call or identify
22 the caller by voice. *Terry-Crespo*, 356 F.3d at 1176. In addition to providing her first name and a
23 description of her vehicle, the caller remained on the line for approximately ten minutes and had a
24 detailed conversation with the 911 operator. By making the 911 call and remaining on the line for
25 such a long period of time, the caller risked any anonymity she might have enjoyed and exposed
26 herself to legal sanction for filing a false report. *Cf. Terry-Crespo*, 356 F.3d at 1176. Further, the
27 911 call in this case was introduced into evidence eliminating any chance for “after-the-fact, police
28 fabrication of an anonymous informant.” *Terry-Crespo*, 356 F.3d at 1175. The Court is satisfied

1 that the caller provided sufficient information to alleviate any concerns about anonymity.

2 Second, this 911 call was entitled to greater reliability because it was contemporaneous with
3 emergency events. As a general matter, 911 calls are entitled to greater reliability than tips
4 concerning general criminality "because the police must take 911 emergency calls seriously and
5 respond with dispatch." *Terry-Crespo*, 356 F.3d at 1176 (citing *United States v. Holloway*, 290 F.3d
6 1331 (11th Cir. 2002), *cert. denied*, 537 U.S. 1161 (2003)). Calls to 911 often involve exigent
7 situations which limit law enforcement's ability to gather identifying information. Indeed, "[p]olice
8 delay while attempting to verify an identity or seek corroboration of a reported emergency may prove
9 costly to public safety and undermine the 911 system's usefulness." *Terry-Crespo*, 356 F.3d at 1176.

10 In this case, the 911 caller reported that she had witnessed a man point a sawed-off shotgun
11 at another person in a Walmart parking lot. The caller described the firearm, the alleged assailant,
12 and the vehicle used by the alleged assailant to flee the scene. Certainly the police need to respond
13 to reports of an individual pointing a firearm at another in a shopping center parking lot. "The
14 Fourth Amendment does not require the police to conduct further pre-response verification of a 911
15 caller's identity where the caller reports an emergency." *Terry-Crespo*, 356 F.3d at 1176.

16 Third, the police may place additional reliability on "first hand information from a crime
17 victim laboring under the stress of recent excitement." *Terry-Crespo*, 356 F.3d at 1176. Gardeley
18 attempts to distinguish *Terry-Crespo* on the ground that it involved a 911 call from the victim of the
19 crime that was reported. There is nothing in the record suggesting that the 911 caller in this case was
20 the victim of the activity she was reporting. Nevertheless, another factor the court considers is the
21 timing of the call in relation to the activity being reported. In *Terry-Crespo*, the court cited *United*
22 *States v. Valentine*, 232 F.3d 350 (3d Cir. 2000) for the proposition that the police may give "greater
23 reliability to a tip, even an anonymous one, where an informant [is] reporting what he observed
24 moments ago, not stale or second-hand information." *Terry-Crespo*, 356 F.3d at 1177. Here, the
25 caller was reporting activity that she had just observed. Given the proximity of the call to the
26 activity, the police were entitled to place additional reliability on the tip.

27 Finally, Gardeley argues that the 911 caller gave dispatch false information thereby
28 undermining her credibility and necessitating further police corroboration. Gardeley claims that the

1 caller lied when she said she was not following the vehicle. Although the caller said she was not
2 following the vehicle, she conceded that she was traveling the same route as the vehicle. It is
3 certainly plausible that an individual can be traveling the same route as another without “following”
4 that individual. Gardeley also claims that the caller lied when she said that she was still in the
5 Walmart parking lot. Even assuming Gardeley’s claim, the Court does not believe this undermined
6 the caller’s credibility to such an extent that the police were required to ignore all other indicators
7 of reliability.

8 Based on the foregoing, the Court finds that the 911 call in this case exhibited sufficient
9 “indicia of reliability” to justify the stop. The call was at least as reliable as the call in *Terry-Crespo*.
10 The call was recorded and presented during the evidentiary hearing. The caller provided her first
11 name and a description of her vehicle—narrowing the likely class of informants. The caller remained
12 on the line for an extended period of time risking any anonymity. The caller reported first-hand
13 observations of an emergency situation within moments after the events occurred. The caller
14 provided a detailed description of the route being driven by the suspect. The call has the necessary
15 indications of reliability to justify the stop in this matter. Thus, the evidence obtained as a result of
16 the stop is not subject to suppression.

17 RECOMMENDATION

18 Based on the foregoing and good cause appearing therefore,
19 IT IS THE RECOMMENDATION of the undersigned Magistrate Judge that the
20 Defendant’s Motion to Suppress (#29) be **DENIED**.

21 NOTICE

22 Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must**
23 **be in writing and filed with the Clerk of the Court on or before May 25, 2010.** The Supreme
24 Court has held that the courts of appeal may determine that an appeal has been waived due to the
25 failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This
26 circuit has also held that (1) failure to file objections within the specified time and (2) failure to
27 properly address and brief the objectionable issues waives the right to appeal the District Court’s
28 order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d

1 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

2 DATED this 11th day of May, 2010.

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6 ROBERT J. JOHNSTON
7 United States Magistrate Judge
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